[redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1868

WILLIAM B. SAXBE, Attorney General of the United States, and HOWARD A. CALLAWAY, Director, United States Bureau of Prisons, *Petitioners*

v.

THE WASHINGTON POST CO. and BEN H. BAGDIKIAN, *Respondents*

BRIEF FOR THE RESPONDENTS

[redacted]

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The Court of Appeals' opinion of February 21, 1974 is unreported, but appears at Supp. Pet. 8-28.[1] The District Court's opinions of April 5, 1972 and December 19, 1972 are reported at 357 F. Supp. 770 and 779, and appear at Pet. 19-28 and Pet. 29-36.[2] The Court of Appeals' order of September 6, 1972 is reported at 477 F.2d 1108, and appears at Pet. 37-39.

[1] "Supp. Pet." refers to the Supplemental Petition for Certiorari.

[2] "Pet." refers to the Petition for Certiorari.

JURISDICTION

The petition for writ of certiorari before final judgment was filed on February 15, 1974. The judgment of the Court of Appeals was entered on February 21, 1974. Supp. Pet. 1-28. A supplemental petition for writ of certiorari was filed on February 22, 1974. Certiorari was granted on March 4, 1974. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND POLICY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Bureau of Prisons Policy Statement No. 1220.1A (Feb. 11, 1972) provides in pertinent part:

> "(6) Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. However, conversation may be permitted with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs and activities.
>
> . . .
>
> (8) Press representatives may visit schools or business establishments which employ offenders in community programs, if the permission of the school or employer is obtained in advance. The rules outlined in paragraph . . . (6) . . . also apply equally in the community situation."[4]

[4] Policy Statement No. 1220.1A is reprinted in its entirety, Pet. 26-28.

QUESTION PRESENTED

Whether, under the First Amendment, the United States Bureau of Prisons may prohibit all interviews between any member of the press and any individual prison inmate, at all institutions subject to its control, under all circumstances, and at all times.

STATEMENT

I. THE PARTIES

Respondent, The Washington Post Company publishes *The Washington Post*, a daily newspaper of general circulation. Respondent Ben H. Bagdikian at the relevant time was Assistant Managing Editor of *The Washington Post*, with more than thirty years of experience as a journalist. App. 85-86.[1] He has had extensive experience reporting on prisons, and from September, 1971 to January, 1972 published a special series of articles in *The Washington Post* on local, state and federal correctional facilities. App. 9-47. These articles demonstrate the seriousness and scope of respondents' interest in reporting on prisons. They were the product of Mr. Bagdikian's visits to numerous prisons and other correctional facilities, and of his personal interviews with numerous inmates. In Pennsylvania, state correctional officials permitted him to be incarcerated in a state prison for a week, without his identity being known to the warden, other staff members, or the prisoners. App. 86-87.

Petitioner William Saxbe is the Attorney General of the United States. Petitioner Norman Carlson is the Director of the United States Bureau of Prisons, and as such administers a correctional system embracing (as of 1972) 28 institutions, 14 halfway houses, and 21,500 inmates. App. 200, 212.

[1] "App." refers to the Appendix filed in this Court.

II. THE CIRCUMSTANCES OF THIS CASE

In mid-February, 1972, peaceful inmate work stoppages took place at the federal prison facilities at Lewisburg, Pennsylvania and Danbury, Connecticut. Lewisburg is a medium security penitentiary. App. 174. Danbury is a correctional facility for intermediate-term inmates. App. 197. Respondent Hagelthan learned of these events from various sources and subsequently received reports that inmates who had served on negotiating committees during the stoppages had been subjected to reprisals by prison authorities. App. 88-89. He was invited by members of the negotiating committees and by other inmates to interview them. App. 95-96, 61.

Satisfied that the work stoppages and their aftermath were newsworthy events,[8] Mr. Hagelthan called the United States Bureau of Prisons on March 1, 1972 for permission to visit Lewisburg and Danbury and to interview members of the inmate negotiating committees and other inmates who had written to him with complaints. He wished to ascertain how the work stoppages had been resolved without violence, the role played by elected inmate negotiating committees in reaching a peaceful settlement, and whether the inmate leaders had been punished despite promises of no reprisals. App. 89, 92, 94-95, 110.

[8] See App. pp. 94-95. Mr. Hagelthan's news judgment was supported by the Executive Editor of *The Washington Post*, Benjamin Bradlee, and the Managing Editor, Howard Simons. App. to Respondents' news coverage of the work stoppages appears at App. 66-67. A letter of inquiry from Senator Sam Ervin concerning the opportunity for press coverage of the stoppages appears at App. 64-65.

A Bureau official told Mr. Bagdikian that existing regulations did not permit press interviews with inmates. Mr. Bagdikian repeated his request in a letter to Director Carlson dated and delivered March 2, 1972. On the same day, Mr. Carlson formally denied the request in a letter stating that "the Bureau of Prisons' policy does not permit press interviews with inmates." App. 89-90, 95-96. Neither in that letter nor at any other time has the Bureau contended that any emergency or other special conditions prevailed at Lewisburg or Danbury at the time Mr. Bagdikian requested permission to interview. Nor has the Bureau at any time contended that the particular inmates Mr. Bagdikian sought to interview were "big wheels" or disciplinary problems or in any other way presented particular difficulties to prison authorities. Thus, this case does not raise any question as to the power of prison officials to deny press interviews during periods of institutional emergency or other special conditions. It also does not present any issue as to the power of prison officials to deny press interviews with inmates whose past behavior shows that press interviews with them would present a serious risk of immediate administrative or disciplinary problems in the prison. The sole basis for the denial of the requested interviews in this case was the Bureau's across-the-board prohibition of such interviews.

III. THE BUREAU OF PRISONS' POLICY ON PRESS INTERVIEWS WITH INMATES.

The Bureau of Prisons' policy on press interviews with inmates is contained in Bureau of Prisons Policy Statement 1220.1A (Feb. 11, 1972).* The Policy State-

*Policy Statement 1220.1A is reprinted in full at Pet. 92-96.

ment uses the term "interview" to mean a face-to-face oral communication that is planned in advance, involves a previously designated inmate, and lasts a sufficient time to permit an in-depth discussion. App. 175, 180, 191, 198.

The Policy Statement prohibits all interviews between newsmen and inmates in all circumstances, regardless of the characteristics and record of the inmate sought to be interviewed, the willingness of the inmate to be interviewed, the institution in which he is held, conditions prevailing at that institution, and any other factors. The prohibition extends to "schools or business establishments which employ inmates in community programs." § 4(b)(8). Thus even prisoners released into the community under various training, furlough and other programs involving unsupervised contact with non-prisoners may not be interviewed by the press. The no-interview policy applies uniformly to the six major federal penitentiaries and the entire far-flung complex of institutions, camps, community treatment centers, minimum security compounds, and schools and business establishments which employ inmates in various special programs.

Policy Statement 1220.1A permits a newsman to hold a "conversation . . . with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs and activities." § (b)(6). In general, "conversations" are distinct from "interviews" occur when a newsman is taking a guided tour of an institution and stops to ask an inmate about the food, or the training programs, or a similar matter. As Warden John Norton of Danbury testified, "The distinction between conversation and interview is a fine

questions almost on the move, whereas an interview is sitting down at length with a named individual." App. 108. A conversation differs from an interview in that it is spontaneous rather than planned in advance, involves a randomly encountered inmate rather than one designated in advance, and lasts a few minutes rather than a sufficient time to permit in depth discussion. App. 174-75, 198-99, 207-08, 227. Moreover, the Policy Statement permits only conversations about "institutional facilities, programs and activities." It does not permit conversations about inmate strikes and other disturbances of normal prison routine. App. 94.

The Policy Statement has been interpreted by the Bureau to permit a newsman to interview a randomly selected group of inmates. App. 198-99, 226-27.

It permits inmates to send to newsmen letters which are not opened by prison officials. ¶ 4(b)(1). Newsmen may write to inmates, but their letters are inspected by prison officials for contraband, and are read for content which would incite unlawful conduct. ¶ 4(b)(2).

The Policy Statement encourages newsmen to visit federal correctional institutions for the purpose of preparing reports about institutional facilities, programs and activities. ¶ 4(b)(5). Newsmen may also visit schools and business establishments which employ prisoners in community programs, if the permission of the school or employer is obtained in advance. ¶ 4(b)(8). Finally, the Policy Statement permits newsmen to photograph programs and activities at federal correctional institutions. Inmates may be photographed if their permission is obtained. ¶ 4(b)(7).

IV. PROCEEDINGS BELOW.

Upon being denied permission to interview inmates at Lewisburg and Danbury, respondents sued for declaratory and injunctive relief. The District Court denied respondents' motion for a temporary restraining order. App. 78-79. Thereafter, respondent Hagelthan visited Lewisburg and Danbury prisons and made use of the opportunities afforded him under the Policy Statement, but was not permitted to interview any inmate individually. At Lewisburg he met with a randomly selected group of inmates. App. 80-83. A hearing was then held on respondents' motion for a preliminary injunction. The evidence consisted almost entirely of live testimony. At the conclusion of the hearing and at the court's suggestion, the parties submitted the entire case. The District Court held for respondents, and denied a stay. The Court of Appeals also denied a stay. This Court granted a stay, 408 U.S. 912 (1972). Petitioners appealed to the Court of Appeals, which remanded for additional findings and for reconsideration in light of *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), which was decided the day before oral argument. On remand, the District Court heard additional live testimony, received depositions and evidence of the policies in numerous state and local jurisdictions, and issued a new opinion, detailed findings and conclusions and a new order. Petitioners again appealed. While this case was pending in the Court of Appeals, petitioners sought certiorari before judgment in this Court. While the petition was pending, the Court of Appeals affirmed the judgment of the District Court. This Court granted certiorari, and consolidated this case with *Procunier* v. *Hillery*, No. 73-704, and *Pell* v. *Procunier*, No. 73-918.

V. THE RECORD.

A. The Press Interest in Private, In-Depth Interviews with Inmates.

On this issue the District Court received extended testimony from six persons.

Arthur L. Liman served as general counsel to the New York State Special Commission on Attica, which prepared the official report on the Attica riots of 1971. In that capacity he supervised the Commission's entire investigation, including the largest program of interviewing prison inmates ever undertaken by persons other than prison officials. Mr. Liman testified on the basis of his experience in directing some 1,000 interviews with inmates, at least 75 of which he conducted personally. App. 280-91. Since Mr. Liman is not a newsman, his testimony cannot be regarded as self-serving. But since his investigative function was similar to that of a newsman, his experience is highly relevant to the press interest in this case.

Elie Abel is Dean of the School of Journalism at Columbia University, and Roy M. Fisher is Dean of the School of Journalism at the University of Missouri. Both testified on the basis of extensive experience as working journalists and as educators at two of the Nation's leading journalism schools. App. 302-04, 470-82.

Three reporters also testified. Respondent Ben Bagdikian is an experienced reporter on prisons, who has conducted many interviews with prisoners. App. 9-47, 80-88. Timothy Leland, Assistant Managing Editor of *The Boston Globe* and head of its investigative reporting team, has won the Pulitzer and other prizes for investigative reporting. App. 352-53. John

W. Machmeck, a reporter for *The Rochester Times Union*, won a Pulitzer Prize in 1972 for his coverage of the Attica riots. App. 501-02.

Witnesses Lyman, Fisher, Ragghianti and Leland testified in court; witnesses Abel and Machmeck testified at deposition. All were subject to cross-examination.

On the basis of their testimony and other evidence, the trial court stated:

> "The Court has determined on the basis of detailed factual findings filed herewith that private personal interviews are essential to accurate and effective reporting. Ethical newspapers rarely publish articles based on unconfirmed letter communications. Reliability of such information must be determined by face-to-face confrontation. This is universally recognized by experienced journalists and demonstrated by the results of many confidential interviews conducted during the recent Attica investigation. Testimony of Lyman and Fisher and the Attica Report itself are particularly persuasive on this key issue." 397 F. Supp., at 781.

The detailed findings of the court that support this general finding appear at Pet. 50-57.

Mr. Lyman described what the Attica Commission wanted to find out:

> "The objective of the interviews was to determine what were the conditions at Attica, what were the events that led to the uprising, what happened during the uprising, why did the negotiations fail, what happened during the police assault, were there any reprisals afterward, and what were the conditions at Attica at the time that we were conducting our interviews." App. 200.

This is precisely the kind of information a newsman would seek. Mr. Liman testified on the basis of his experience that he could not have obtained the necessary information through correspondence with inmates:

> "[I]t is the same reason that I have always found, as a lawyer, that written interrogatories are not as effective as oral cross-examination, in talking to witnesses. Because you don't have the opportunity of an immediate follow-up.
>
> "Also, in an institution like Attica, you are dealing with a number of people who are not literate; and you are also, when you submit written questions, running the risk that the answers that you get will not be the answers of that inmate but rather will be the answers of everybody he has talked to, shown the questionnaire to; and that we are getting again a response that reflects peer group pressure, or administration pressure, rather than the conviction of the inmate, himself." App. 203.

Mr. Liman testified further that interviews with groups of inmates were unsatisfactory for his purposes:

> "We found that in the group interviews the inmates tended to give us rhetoric, rather than facts; and that we were experiencing virtually the same phenomena that the observers and press that entered the D Yard during the uprising had found, namely, that in the interest of showing solidarity, inmates were making speeches to us rather than confiding what I knew in many cases to be the fact.
>
> "I should add that the basic problem in conducting interviews at a prison is that it is a society in which inmates face sanctions and rewards not just from the administration but from other inmates; and that when an inmate sees you in private, he

will tell you things about the administration that may not only be unfavorable but may in many cases be favorable. I found that when we saw them in groups, there was a tendency to say nothing favorable about the administration and instead simply to make a speech about how horrible conditions were. In fact, many of the inmates who would say this in group would say something different when they were seen alone." App. 200-01.

Mr. Litman concluded, "[T]he Commission's experience was that the only interviews that were fruitful for us were those which were conducted privately . . . ." App. 206.

Finally, Mr. Litman gave specific examples of information the Commission obtained from private in-depth interviews with inmates which could not have been obtained in any other way:

". . . the extent of racism was something which we got more perception of from the private interviews than we got from the public and group interviews. In particular, inmates were more willing to talk about racism, not simply by the administration but also racism among inmates; whereas, when they were interviewed in the presence of other inmates, they would ignore the racism by inmates altogether.

"The presence of homosexuality, and both forcible and consensual, was a subject on which inmates appeared to talk more freely when they were in a private interview than when they were in group or when they were talking publicly.

"There is something which is not stressed in our description of conditions because we found it not to be a major factor at Attica, and that is the question or the issue of physical brutality toward inmates. The press, before this investigation, had played that up as the major grievance at Attica.

We found, when we talked to inmates privately, that the incidence of physical confrontation between officers and inmates was rather limited, and that the real grievance was not about those incidents, but rather about what they would feel was a form of psychic repression, depriving people of their manhood. Therefore, I think a lot of the myth about physical beatings was dispelled.

"We were able to ascertain the extent of tension at the institution, the role of groups at the institution before the uprising. We were able to ascertain the method that the officer, who died during the taking of the prison by the inmates, had died. We were able to ascertain the extent to which inmates ended up in the Yard, either through fear or through compulsion by others, as opposed to acts of volition by themselves.

"In general, when talking publicly, particularly during the uprising, the inmates said that this was a great act of voluntary, concerted action; whereas, in privacy, you got a very different picture of the circumstances under which people entered the Yard.

"We were able to obtain the details of the reprisals that took place after the uprising. That was a subject on which inmates were very reluctant to testify publicly, when we had our public hearings, because of fear of reprisals from the Parole Board or other bodies. Not that I am saying that they would have taken place, but the inmates feared they would take place.

"We were able to ascertain the fact that a majority of the inmates really were prepared to accept the 28 points, but for various reasons never were willing to express themselves on that in the Yard. We were able to detail what the factors were that led them to remain silent.

"..."

"We were able to determine the fact that several inmates, including L. D. Barkley, who were rumored to have been killed after the prison was retaken, actually died during the initial seconds of the police assault. That was one that posed a particular problem, because inmates in group tended to rely on rhetoric, saying that he was murdered after the uprising had ended; whereas, in privacy, some of them, including his friends, were willing to talk about the circumstances of his death.

"Above all, we were able to get a glimpse of what we have described as the dehumanizing conditions that existed in the prison which inmates were willing to cite fact about in private interviews, whereas, when you saw them in groups, it was again very conclusory-type statements." App. 901-08.

Mr. Litman's testimony was confirmed by the other witnesses.

'The other witnesses all testified to the inadequacy of news gathering by mail.' Dean Fisher, Dean Abel, and Mr. Leland emphasized that as a practical matter it is not possible to evaluate an inmate's reliability (accuracy) or credibility (honesty) where communication is by mail. App. 819-18, 401, 1003-04. They pointed out that an exchange of correspondence does not permit a newsman to pursue a line of questioning in depth or to ask follow-up questions on the basis of a particular response. *Id.*; see also App. 518 (Machmeck). Mr. Hagelthan and Mr. Machmeck testified that communication by mail can make it impossible to develop current

'Two of the letters received by Mr. Hagelthan inviting him to Lewisburg appear at App. 61, 69-70.

information about events or prison conditions. App. 99-100, 513.

The evidence showed that casual conversations with randomly-encountered inmates are not an adequate substitute for private, in-depth, uncensored interviews with designated inmates, for which the reporter can prepare in advance. Director Carlson and the wardens at Lewisburg and Danbury all testified that conversations are very limited in duration, App. 208, 175, 108, so that they permit only the most superficial discussion of a topic. Policy Statement 1220.1A specifically restricts the content of such conversations, and Mr. Hagelthian's experience during his visits to Lewisburg and Danbury was that the restriction was enforced. App. 112-13. Moreover, conversations are not private; they are likely to be conducted within the hearing of the prison official accompanying the newsman on his tour of the facility. App. 110-18. In addition, because a newsman is not permitted to designate in advance the inmates with whom he will converse, the opportunity for casual conversation gives him no access to inmates who are known to have particular complaints or other particular information. Finally, under ¶ 4(b)(6) of the Policy Statement, a newsman may not identify in his story an inmate with whom he had a conversation, and this prohibition will detract from the force of the story and from the credibility of the inmate on whose statements it is based.

Mr. Hagelthian's experience at Lewisburg confirmed his expert judgment that group interviews are "very unproductive" for the purpose of gathering information. App. 115. The particular inmates he traveled to Lewisburg to interview were not part of the randomly selected group he met with. Moreover, the

inmates in the group stated they could not speak with candor out of fear that what they said would be reported to prison officials by other inmates and result in reprisals. App. 92-93.

The testimony also showed that the willingness of federal prison officials to provide the news media with information is no substitute for private, individual interviews with inmates. Mr. Machnacek testified extensively about his Pulitzer Prize winning discovery that prison officials in New York State had deliberately misled the press when they stated that the nine guards killed during the state police assault on Attica had died from slit throats, when in fact they had died from gunshot wounds. App. 502-08, 518. Mr. Machnacek's account was confirmed by the Report of the New York State Special Commission on Attica, Plaintiffs' Exhibit 9, pp. 455-62. Dean Fisher, Dean Abel and Mr. Leland testified more generally that as a matter of common sense and sound journalism, a reporter cannot satisfactorily rely solely or principally on the statements of public officials when the proper discharge of their official responsibilities may be in question. App. 318, 488-89, 495-96, 502.

All of the witnesses on the press interest testified that private face-to-face interviews in depth are an indispensable tool of news gathering in the prison context. Dean Abel summed the matter up: "the interview is clearly the fundamental method of reaching out to people who have information, in getting from them that information, so that you, in turn, may then communicate to a larger audience." App. 481. The witnesses provided from their own experience a number of examples of specific instances where face-to-face interviews played the critical role in a newsman's decision to pursue a news story or to refrain from publishing it.

App. 300-07, 355-58, 484-85, 508-11. Interviews are so important in news gathering that the development of interviewing techniques is a central feature of the curricula of the nation's most prestigious journalism schools. App. 301-06, 482-85. A published study concluded that "lack of contact between the newsman and a news source increases the chance that serious subjective errors will be perceived as occurring or will occur."[14] Finally, a sociologist of prisons, who also had extensive experience as a prison administrator, testified that he could obtain an understanding of a penal institution only if he had the opportunity to conduct face-to-face interviews with inmates and prison officials. App. 509.

The evidence also confirmed Mr. Lyman's conclusion that interviews with inmates must be in private if they are to be candid. Mr. Hagelthorn testified on the basis of his extensive experience in reporting on prisons that the presence of a prison official would distort the interview because "a prison official has total control over the life of a prisoner and the prisoner knows it." App. 97. Mr. Hagelthorn's experience with group interviews confirmed that distortions will occur if other inmates are present during an interview with a particular inmate. See pp. 15-16, *supra*.

On the basis of all the foregoing evidence, the District Court found that the accurate and effective reporting of news about prison conditions and events and prisoner grievances has a critical dependence upon the opportunity for face-to-face interviews with inmates. Finding 27, Pet. 57. The Court of Appeals agreed. See Supp. Pet. 12-15.

[14] G. Lawrence and D. Grey, *Subjective Inaccuracies in Local News Reporting*, 46 Journalism Quarterly 760, 760 (1969). Plaintiffs' Exhibit 66.

B. Correctional Considerations.

On this issue, the District Court received testimony from officials of the prison systems in Massachusetts, Illinois, Florida, California, Iowa, New York City, the District of Columbia, Cook County, Illinois, and the federal prison system.

John O. Boone, Commissioner of the Massachusetts State Department of Corrections, testified on the basis of twenty-one years' experience in the field of corrections, including his experience as Commissioner of the Massachusetts system, Superintendent of the Lorton Correctional Complex and Chief of Classification and Parole at the federal prisons in Atlanta and Terre Haute. Commissioner Boone testified that Massachusetts has a policy which generally permits press-inmate interviews, and that this policy was working successfully. He stressed that press-inmate interviews had not created any disturbances, disciplinary problems, or other security problems, but rather had helped to alleviate tensions within Massachusetts penal institutions. App. 321-48.

Peter N. Hoeninger, Illinois Director of Corrections, testified on the basis of his experience as Director of the Illinois penal system and President of the Association of State Correctional Administrators. Director Hoeninger testified that a discretionary press-inmate interview policy was working satisfactorily in Illinois, and had not created any major disciplinary or other security problems. He stressed that his wardens could identify inmates who were potential trouble makers, and thus had the ability to make sound judgments as to whether particular interviews should be granted. Director Hoeninger further testified that the Association

of State Correctional Administrators had promulgated a guideline providing for a discretionary press-inmate interview policy, having also concluded that prison administrators can effectively exercise discretion in determining when to grant press-inmate interviews. App. 525-04.

Hans W. Mattick, Professor of Criminal Justice and Director of the Center for Research in Criminal Justice at the University of Illinois, testified on the basis of his extensive research in the area of criminology, his experience as operating head of the Cook County Jail, as an official at Stateville Penitentiary, Joliet, Illinois (where he interviewed all inmates up for parole and made recommendations to the Parole Board), and as an administrator of prisoner-of-war camps. Professor Mattick testified that he strongly favored a policy permitting press-inmate interviews, and that he did not believe that such a policy would create "big wheels" or lead to other disciplinary problems. He also stressed that a discretionary press-inmate interview policy would not impede the goal of uniformity, for any differences in the exercise of discretion under such a policy would be insignificant in view of the substantial differences among all federal penal institutions, each of which reflects the region in which it is located, the style of its administrator, staff, and inmate population, and its physical plant and other facilities. He concluded that a policy permitting press interviews would work more effectively in a federal than in a state penal system because of the high percentage of white collar inmates in federal institutions. App. 575-608.

Benjamin Malcolm, Commissioner for the New York City Department of Corrections, testified on the basis

of over twenty years' experience in the field of corrections, Commissioner Malcolm testified that the New York City policy, which generally permits press-inmate interviews, has been advantageous to the correctional system by alleviating inmate tensions and improving public understanding of the correctional system. He emphasized that this policy had not impeded the correctional process, and had not created any administrative, disciplinary, or other security problems. App. 121-41.

Leroy Anderson testified on the basis of his experience as Executive Assistant to the Director of the District of Columbia Department of Corrections. He testified that the District of Columbia's discretionary press-inmate interview policy was successful and had created no problems or difficulties of any kind. App. 141-51.

Noah D. Aldredge, testified on the basis of his experience as warden of the federal prison at Lewisburg and then at Terre Haute. He testified that there had been a disturbance at Terre Haute following a congressional aide's interviews with inmates. Warden Aldredge did not testify that press interviews had caused the disturbance, and acknowledged that there had been disturbances before the interviews. He added that only a small portion of the inmate population posed disciplinary problems, and that his staff was generally able to identify such persons. App. 172-95, 1170-1193.

Lou V. Brewer, Warden of the Iowa State Penitentiary, testified on the basis of over fifteen years' experience in the field of corrections. Warden Brewer testified that Iowa has a discretionary press-inmate inter-

view policy, and that during a period of tension at the Iowa State Penitentiary interviews were granted, and the subsequent publication of news stories about the prison heightened the state of tension. He acknowledged, however, that he was opposed to the granting of press interviews at that particular time because of the tense conditions at the penitentiary, but was overruled by the Governor's office. He testified that since that incident, he has continued to permit press interviews without creating any problems, for the decision to grant such an interview depends on an analysis of the inmate involved, the climate of the institution, and the situation at the time. App. 480-81.

John J. Norton, Warden of the federal correctional institution at Danbury, Connecticut, testified on the basis of over twenty years' experience in the field of corrections. Warden Norton testified that he believed that press-inmate interviews should be prohibited because such interviews would build up the leadership of individual inmates. He offered no examples or other evidence to support this conclusion, nor did he state the reasons for this belief. App. 498-508.

Raymond K. Procunier, Director of Corrections for the State of California, testified on the basis of his experience with California penal institutions. Director Procunier testified that California had once permitted press-inmate interviews, but that this policy had been changed to an outright prohibition after the death of George Jackson and four other persons during an escape attempt. Director Procunier explained that on penological grounds he favored a flexible press-inmate interview policy, but that California had adopted an outright prohibition because counsel advised him that

selective prohibition would not be possible. App. 151-72.

Louis L. Wainwright, Director of the Florida Division of Corrections, testified on the basis of his experience as Director of the Florida corrections system. Director Wainwright testified that he was opposed to a press-inmate interview policy because he believed that it would lead to prison disturbances. He based this view on the fact that his superior had granted certain press interviews at the Florida State Prison over his objection, and four months later serious disturbances occurred. He attributed these disturbances to the published reports which resulted from the press interviews, but admitted that racial tensions existed at the institution and that there had been disturbances on various occasions prior to the granting of any press interviews. App. 401-21.

Director Carlson testified on the basis of his experience of over fifteen years in the field of corrections. He described the history of Policy Statement 1220.1A and set forth the reasons why he adopted it. App. 208-28, 441-50.

In addition to testimony from prison officials, evidence was received showing the current policy with respect to confidential in depth interviews between members of the press and inmates of correctional institutions in twenty four American state and local jurisdictions. The trial court found that of these, eleven generally permit such interviews. Seven American jurisdictions have policies that neither generally permit nor generally deny such interviews, but vest in correctional administrators discretion to permit or deny them in individual cases. Five American jurisdictions

generally prohibit such interviews. New Mexico has a unique policy, permitting randomly selected inmates to be interviewed individually. See Finding 52, Pet. 67.

On the basis of this evidence, the District Court found:

> "The rule adopted by the Bureau of Prisons is a rule of comfortable convenience and not of compelling necessity . . . . While [press] access may be limited in individual circumstances, the Government has totally failed to demonstrate any 'compelling' or 'paramount' need. The absolute ban cannot withstand analysis." 507 F. Supp., at 782.

The Court of Appeals agreed:

> "Thus, while we do not question that the concerns voiced by the Bureau are legitimate interests that merit protection, we must agree with the District Court that they do not, individually or in total, justify the sweeping absolute ban that the Bureau has chosen to impose . . . . In this case the scope of the interview ban is excessive; the Bureau's interests can and must be protected on a more selective basis." Supp. Pet. 23.

SUMMARY OF ARGUMENT

I

The First Amendment protects the public's right to be informed by the press about matters of public interest, including prisons. On many occasions this Court has recognized the fundamental importance of an informed public, and the special role of the press under the First Amendment as informer of the public. Because prisons are important public institutions which exercise broad discretion over the lives of inmates, and because they are not freely open to the entire public, the informing function of the press is particularly im-

portant as to them. There is no other source of public information concerning prisons which can substitute for press reports. The prospects for prison reform and for reducing the number of civil rights suits brought by prisoners in federal courts depend to a significant degree on the opportunity for the press to inform the public about prison conditions. Thus this case presents an important opportunity for this Court to remove an artificial restraint on the political process, whose functioning depends on public opinion informed by the press.

II

The right of the press to gather news is an indispensable element of the public's First Amendment right to be informed about matters of public interest. This general principle was recognized in *Branzburg v. Hayes*, 408 U.S. 665 (1972), but the decision in the instant case cannot be made by reference to *Branzburg*, but only by weighing the asserted press and governmental interests. The Government has a heavy burden to demonstrate the necessity for its broad prior restraint.

Policy Statement 1220.1A directly and severely restricts news gathering by denying the press the use of a critical news gathering method. All that respondents claim is a right of a newsman to communicate with a willing prisoner in an interview for the purpose of news gathering, subject to reasonable prison regulations as to time, place and manner. A similar opportunity is already given to relatives, friends, lawyers, clergymen, public officials, former and prospective employers and others who visit inmates. Accordingly, this case can be decided very narrowly.

III

The opportunity for private in-depth face-to-face interviews is critical for accurate and effective news gathering. Such interviews are significantly superior to all alternative methods of news gathering in the context of prisons because they are flexible in format, permit an evaluation of demeanor, allow pursuit of topics, facilitate the communication of a large quantity of information, do not involve the delay associated with mail, and can be used to communicate with illiterate inmates. Letters, casual conversations, group interviews and statements from prison officials do not obviate the critical need for interviews with individual inmates.

IV

No compelling governmental interest supports Policy Statement 1220.1A's total ban on press interviews with inmates. The interest in prison discipline and security, although certainly a compelling interest, may not be invoked as a "talismanic incantation" to defeat a constitutional claim without close analysis of the particular regulation at issue and of the evidence as to its necessity.

A. The experience of numerous prison systems throughout the United States demonstrates that there is no compelling reason to ban all press-inmate interviews. The record contains extensive evidence on the successful experience of several jurisdictions with a policy generally permitting press-inmate interviews and denying them in certain narrowly defined circumstances.

B. The "big wheel" theory does not justify a total ban. Big wheels are a tiny percentage of the inmate

population, and are readily identified by prison officials. The order developed by the courts below permits prison officials to deny interviews with big wheels and other inmates with a history of disruptive behavior.

C. The record does not show that press interviews cause prison disturbances. None of the testimony concerning prison disturbances pointed to press interviews as a significant causal factor.

D. The Bureau of Prisons has no interest in uniformity sufficient to justify a total ban on press-inmate interviews. The order developed by the courts below is fully consistent with the Bureau's interest in uniformity and its general practice of giving broad discretion to wardens within the limits of policy guidelines.

E. Property law concepts do not justify the total ban. Prisons are public property, not private. The Government may not invoke property concepts to justify sealing off thousands of persons from press and public scrutiny. Since newsmen seek to use prison property only in the same way that inmates' relatives, friends, lawyers and other visitors use it, they cannot be regarded as trespassers. In the circumstances of this case, First Amendment rights outweigh any countervailing claims of property.

F. No other considerations justify a total ban. Press-inmate interviews will not create any undue administrative burdens, nor do newsmen jeopardize prison security.

V

A prisoners' right to be interviewed is no substitute for a press right to interview. Prisoners may not be able or willing to initiate and pursue a request to be interviewed in the face of opposition from prison

officials. The press is in a better practical position to assert and protect the right to an interview. The interest of the press and public is different from that of the prisoner in being interviewed. These interests rest on different foundations in First Amendment law.

VI

The order developed by the courts below is sound. It provides for the exercise of informed discretion by prison officials on a case-by-case basis, and articulates an objective test for their guidance. The record shows that the order is feasible and consistent with correctional goals, and it properly reflects the weight of First Amendment values.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS THE PUBLIC'S RIGHT TO BE INFORMED BY THE PRESS ABOUT MATTERS OF PUBLIC INTEREST, INCLUDING PRISONS.

On many occasions this Court has emphasized that the overriding subject of First Amendment protection is the public's right to receive information and opinions concerning matters of public interest. In *Garrison* v. *Louisiana*, 379 U.S. 64, 77 (1964), the Court, per Mr. Justice Brennan, upheld "the paramount public interest in a free flow of information to the people concerning public officials, their servants." In *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945), it observed that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." In *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969), the Court, per Mr. Justice White, characterized the rights of television and radio audiences as "paramount. . . . It is the right of the public to receive suit-

able access to social, political, esthetic, moral and other ideas and experiences which is crucial here." In *Kleindienst* v. *Mandel,* 408 U.S. 753, 762 (1972), the Court, per Mr. Justice Blackmun, stated: " 'It is now well established that the Constitution protects the right to receive information and ideas.' " See also *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965).

The public's right to be informed is critical to its capacity to make intelligent decisions in our democratic political system. It is also indispensable to the progress of science, the arts, the economy, and social life generally. *Curtis Pub. Co.* v. *Butts,* 388 U.S. 130, 147 (1967) (plurality opinion); *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29, 42 (1971) (plurality opinion).

This Court has also recognized many times that the First Amendment assigned to the press a unique, constitutionally protected role as informer of the public:

> "The Constitution specifically selected the press ... to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills* v. *Alabama,* 384 U.S. 214, 219 (1966).[8]

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[8] The unique constitutional status of those who inform the public is entirely consistent with the application to them of laws of general scope that do not impede the performance of First Amendment functions. Thus the press is properly subject to tax laws, antitrust laws, labor laws, and the like. The special constitutional status is relevant, however, whenever, as in the instant case, a statute or regulation is directed solely at the press or directly impedes its carrying out of the informing function. *See, e.g., Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936).

"A broadly defined freedom of the press assures the maintenance of our political system and an open society." *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967). The informing function of the press was perhaps most simply and forcefully described by Mr. Justice Black in *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (concurring opinion):

> "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people."

See also Niemotko v. *Maryland*, 340 U.S. 268, 276 (1951) (Frankfurter, J., concurring).[9]

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[9] The Government professes not to know what persons are encompassed within "the press". See Brief for Petitioners 48-52. Yet Policy Statement 1220.1A itself defines the term "news media" to mean "A Newspaper entitled to second class mailing privileges, a magazine or periodical of general distribution; a national or international news service; a radio or television network or station." ¶ 4(a). The Policy Statement goes on to recognize a number of rights of the "news media" so defined. A right to interview would not present any additional definitional problems. One might cavil at the Policy Statement's definition, but there is no need to do so in the instant case, for respondents certainly fall within the definition. The question of who constitute "the press" exists for every governmental agency, including this Court, that holds press conferences or issues press releases or has a press gallery or room, or provides other facilities or services for newsmen. The question has been occasionally litigated, see *Consumers Union* v. *Periodical Correspondents' Ass'n*, 365 F. Supp. 18 (D.D.C. 1973); *Quad-City Community News Service* v. *Jebens*, 334 F. Supp. 8, 13-14 (S.D. Iowa 1971), but certainly there has not been a flood of litigation. Presumably, most of the questions that have arisen have

Although this Court has not yet had occasion to consider the application of these principles to prisons, a majority of lower federal cases have held that they apply with the same or even greater force in the prison context than in other contexts. *See,* in addition to the decision below, *Burnham* v. *Oswald,* 342 F. Supp. 880 (W.D. N.Y. 1972); *Houston Chronicle Pub. Co.* v. *Kleindienst,* 364 F. Supp. 719 (S.D. Tex. 1973), *app. dismissed,* No. 73-3590 (5th Cir. Jan. 11, 1974); *McMillan* v. *Carlson,* C.A. No. 72-2551-M (D. Mass. Dec. 31, 1973), *aff'd,* No. 74-1024 (1st Cir. Mar. 20, 1974); *Globe Newspaper Co.* v. *Bork,* Civ. No. 73-3748G (D. Mass. Feb. 12, 1974); *see also Nolan* v. *Fitzpatrick,* 451 F.2d 545 (1st Cir. 1971); *Palmigiano* v. *Travisono,* 317 F. Supp. 776 (D.R.I. 1970).[10]

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been resolved pragmatically and amicably. There is no reason to doubt that the Bureau of Prisons can resolve any such problems in the same way. In *Branzburg,* the Court was concerned about unlimited assertions of privilege by persons claiming to be members of the press. 408 U.S., at 703-04. The Court was concerned about possible large-scale denials of evidence to grand juries and about denials in questionable cases. No such problems exist in the present context. Whatever the definition of "the press", the Bureau of Prisons can protect all its legitimate administrative and security interests: it can set a reasonable limit on the total number of interviews permitted and ration interviews on some equitable basis (e.g., pooling, first-come-first-served), and it can exclude any person claiming to belong to the press whom it has substantial reason to believe will violate the rules governing prison visitors. *Cf. Healy* v. *James,* 408 U.S. 169 (1972).

[10] *Contra, Seattle-Tacoma Newspaper Guild* v. *Parker,* 480 F.2d 1062 (9th Cir. 1973); *Mitford* v. *Pickett,* 363 F. Supp. 975 (E.D. Ill. 1973); *Smith* v. *Bounds,* Civ. No. 2914 (E.D.N.C. Mar. 14, 1972), aff'd No. 73-1658 (4th Cir. June 8, 1973); *Hillery* v. *Procunier,* 364 F. Supp. 196 (N.D. Cal. 1973), prob. jur. noted *sub nom. Pell* v. *Procunier,* 42 U.S.L.W. 3422 (Jan. 21, 1974); *see also Seale* v. *Manson,* 326 F. Supp. 1375 (D. Conn. 1971).

Prisons, like other public institutions, are ultimately the responsibility of elected public officials. As a critical part of the system of criminal law administration, they directly affect the quality of life in society. "On any given day, approximately 1,500,000 people are under the authority of [federal, state, county and municipal prison] systems. The cost to taxpayers is over one billion dollars annually. Of those individuals sentenced to prison 98% will return to society." [11] Accordingly, the public's interest in being informed about prisons is at least as strong as its interest in being informed about other governmental matters. Without adequate information, the public cannot intelligently vote and make its policy preferences known. Because members of the public cannot freely enter prisons and inform themselves of conditions there, the public depends on the press for its information about prisons.

Particularly because prison officials exercise broad discretion over the lives of inmates, the need for effective checks on their actions is paramount. Although administrative and judicial forums provide some oversight, the fundamental check on the exercise of governmental power is public opinion informed by the free press.[12]

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[11] Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 93d Cong., 2d Sess. Report on Inspection of Federal Facilities at Leavenworth Penitentiary and The Medical Center for Federal Prisoners 2 (Comm. Print. 1974).

[12] "As with public institutions in every branch of government, the press plays an invaluable watchdog function with respect to prisons, whose very nature imbues the press' function with heightened significance in comparison to other, more open institutions." *Globe Newspaper Co.* v. *Bork*, No. 73-3748-G, p. 8 (D. Mass. Feb. 12, 1974). The Chairman of the New York City

In recent years, the importance of greatly increasing public information about prisons has been vigorously emphasized by Mr. Chief Justice Burger. He has characterized corrections as "the most neglected, the most crucial and probably the least understood phase of the administration of justice." [13] He has per-

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Board of Corrections has written: "There are few things more powerful in restraining arbitrary or excessive action than the sure knowledge of public accountability. There are few things more necessary than for the public to understand the strain of the correction officer's work and the alienation he feels because of the hostility directed toward him. . . . The correctional community, from the wardens to the guards, has complained forever that its work is not appreciated and the community really does not care what happens to correctional personnel or what goes on in the prisons. The constant, informed attention of the media can illuminate the whole picture, giving balance to the judgments that must be made and appreciation for the courage and compassion of many of the personnel involved." W. vanden Heuvel, *The Press and the Prisons,* Colum. Journalism Rev. 35, 38, 39 (May/June, 1972).

[13] W. Burger, "For Whom the Bell Tolls", p. 2 (Remarks before the Association of the Bar of the City of New York, N.Y., N.Y., Feb. 17, 1970). The Chief Justice also said: "Perhaps the real evil underlying our penal system is not its concepts, whether rehabilitation or vengeance or something else, *but the lack of any agreed concept,* the absence of plan and purpose, and worst of all—*the indifference that underlies the neglect.*" *Id.,* p. 6 (italics in original). On another occasion he observed: "Yet with all this development of the step-by-step details in the criminal adversary process, we continue, at the termination of that process, to brush under the rug the problems of those who are found guilty and subject to criminal sentence. In a very immature way, we seem to want to remove the problem from public consciousness. It is a melancholy truth that it has taken the tragic prison outbreaks of the past three years to focus widespread public attention on this problem." W. Burger, "Our Options Are Limited", pp. 4-5 (Remarks before the 1972 Annual Dinner of the National Conference of Christians and Jews, Phila., Pa., Nov. 16, 1972). Director Carlson agrees: "[W]e need more facilities, positions, personnel, recreational activities and so forth. I think corrections has been

ceptively described the severe difficulties prison administrators have faced in attempting to rehabilitate the prisoners whom society has placed in their care, and has referred to

> "the desperate need for comprehensive and coordinated planning and research at local and national levels. This requires a monumental effort with the best leadership and brains of labor unions, industry, the Departments of Justice, of Labor, and of Health, Education and Welfare. To be successful these programs need local community support which must involve churches, YMCA's, Chambers of Commerce and Bar Associations. . . . If we want prisoners to change, public attitudes toward prisoners and ex-prisoners must change. . . . Where do you begin? The same way you prepare a case. By getting all of the facts, visiting the scene if necessary, and then organizing the evidence. . . . A visit to most prisons will make you a zealot for prison reform."[14]

Since not everyone can visit prisons, just as not everyone can attend sessions of Congress or public trials, the press is a necessary representative of the public in reporting on prisons as on other governmental agencies.

The Government argued below that press interviews with inmates are unnecessary because inmates can take their grievances to court. Indeed, in recent years prisoners in increasing numbers have brought civil

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grossly neglected in the years gone by." App. 209. See also President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 1 (1967) (corrections "a world almost unknown to law-abiding citizens").

[14] W. Burger, "For Whom the Bell Tolls", pp. 9-11 (Remarks before the Association of the Bar of the City of New York, N.Y., N.Y., Feb. 17, 1970).

rights suits in federal court to challenge the conditions under which they are held and the treatment they receive.[15] Many of these suits have had merit and have resulted in judicial condemnation of conditions which an informed American public would not have tolerated.[16]

However, courts ought not to be the principal vehicle for publicizing grievances against public officials or the principal reformers of social institutions. Under our constitutional scheme of government, the free press should be able to report grievances to the public so that *an informed public* can make its weight felt within the *political* branches, and judicial action will be secondary and less frequent. This democratic process has not been at work in the prison context because prison officials customarily have denied the press an opportunity to present to the public a full picture of prison life, including the views of inmates obtained through in-

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[15] From 1966 to 1972 the number of civil rights suits brought in federal district courts by federal prisoners increased from 15 to 252; from 1972 to 1973 the number increased by an additional 64.3% to 414. From 1966 to 1973 the number of federal civil rights suits brought by state prisoners increased from 218 to 4,174. Director of the Administrative Office of the United States Courts. 1973 Annual Report, p. II-27 (Table 20). The Chief Justice devoted particular attention to the problem of increased prisoner civil rights cases in his Report on the Federal Judicial Branch, 7-10 (Remarks to the ABA, Washington, D. C., August 6, 1973).

[16] *See, e.g., Holt* v. *Sarver,* 442 F.2d 304 (8th Cir. 1971); *Roberts* v. *Williams,* 456 F.2d 819 (5th Cir.), cert. denied *sub nom. Roberts* v. *Smith,* 404 U.S. 866 (1971); *Sostre* v. *McGinnis,* 442 F.2d 178, 190, 193-94 (2d Cir. 1971), cert. denied, 404 U.S. 1049 (1972); *Jackson* v. *Bishop,* 404 F.2d 571 (8th Cir. 1968) (Blackmun, J.); *Landman* v. *Royster,* 333 F. Supp. 621 (E.D. Va. 1971); *Wright* v. *McMann,* 321 F. Supp. 127 (N.D.N.Y. 1970), *aff'd,* 460 F.2d 126 (2d Cir.), cert. denied, 409 U.S. 885 (1972); *Talley* v. *Stephens,* 247 F. Supp. 683 (E.D. Ark. 1965).

depth interviews. See App. 338. The President's Commission on Law Enforcement and Administration of Justice concluded:

> "The present problems and disabilities of American corrections reflect the relatively low priority given it in the places where political and administrative choices are made and public and private resources are allocated. . . . [R]eforms will occur only if many individuals and groups assume responsibility for creating needed change. And that, in turn, will depend upon a more complete and realistic public understanding of the problems." Task Force Report: Corrections 105 (1967).

Only when prison authorities remove the dam they have erected to stop the free flow of information to the public, will the tides of prisoner grievances be channeled away from the courts, and perhaps from outbreaks of violence, and into the political process where they belong. In removing artificial restraints on the political process, the Court will be performing its traditional constitutional function. See, *e.g.*, *Stromberg* v. *California*, 283 U.S. 359, 369 (1931); *Grosjean* v. *American Press Co.*, 297 U.S. 233, 249-50 (1936); *De Jonge* v. *Oregon*, 299 U.S. 353, 364-65 (1937).

Finally, the value of press interviews with prison inmates far transcends penal reform. Federal prisons house many newsworthy inmates—former public officials, businessmen, labor leaders, participants in crimes of historical importance, and others.[17] Press reports based on interviews with such inmates can inform the public about a wide variety of matters of interest and

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[17] Prominent inmates are not to be identified with prison troublemakers. See App. 388-91, 398.

importance. Thus, contrary to the suggestion in the Government's brief at p. 19, the interest of the press in interviewing inmates extends far beyond participants in prison disturbances. See, *e.g., Globe Newspaper Co.* v. *Bork,* Civ. No. 73-3748G (D. Mass. Feb. 12, 1974) (attempt to interview author Clifford Irving); *McMillan v. Carlson,* C.A. No. 72-2551-M (D. Mass. Dec. 31, 1973), *aff'd,* No. 74-1024 (1st Cir. Mar. 20, 1974) (attempt to interview brother of James Earl Ray); App. 179 (media interest in James R. Hoffa).

II. THE RIGHT OF THE PRESS TO GATHER NEWS IS AN INDISPENSABLE ELEMENT OF THE PUBLIC'S FIRST AMENDMENT RIGHT TO BE INFORMED ABOUT MATTERS OF PUBLIC INTEREST.

A free press is an essential element of a democracy precisely because the individual members of the public cannot themselves, as a practical matter, gather all the information needed to exercise their political and other responsibilities. This Court's decisions on the informing function, discussed at pp. 27-29, *supra,* all recognize that the press is the agent or proxy of the public, created to do what the public cannot do for itself. Precisely in situations (*e.g.,* prisons) where the public must for good reasons be denied unrestricted access, the press should be permitted reasonable access (absent compelling reasons to the contrary). Surely it would be ironic to deny the public access to information by means of the press on the ground that the press should have no greater rights than the general public. Indeed, if the government could, without fear of scrutiny under the First Amendment, restrict the right of the press to obtain information from sources, visit places, and observe events, the right to publish would

be of little significance. Regulations of the Department of Justice relating to subpoenas to newsmen begin with the premise that "freedom of the press can be no broader than the freedom of reporters to investigate and report the news." 28 CFR § 50.10, 38 F.R. 29588 (Oct. 25, 1973).[18]

It is for these reasons that this Court in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), expressly recognized that news gathering is part of the freedom of the press protected by the First Amendment:

> "Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated. . . . [N]ews gathering is not without its First Amendment protections . . . ." 408 U.S., at 681, 707.[19]

Of course, the Court in *Branzburg* went on to hold that in the particular circumstances of the grand jury subpoenas before it, the First Amendment protection of

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[18] Similarly, President Nixon has determined that newsmen shall have continued access to American military bases abroad "on a regular basis." 39 F.R. 5181 (Feb. 11, 1974).

[19] Other cases recognizing that news gathering is protected by the First Amendment are *Schnell* v. *Chicago*, 407 F.2d 1084 (7th Cir. 1969); *Dietemann* v. *Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971); *Associated Press* v. *KVOS*, 80 F.2d 575, 581 (9th Cir. 1935), *rev'd on jurisdictional grounds*, 299 U.S. 269 (1936); *Lewis* v. *Baxley*, 368 F. Supp. 768 (M.D. Ala. 1973) (3-judge court); *Consumers Union* v. *Periodical Correspondents' Ass'n*, 365 F. Supp. 18 (D.D.C. 1973); *Channel 10, Inc.* v. *Gunnarson*, 337 F. Supp. 634 (D. Minn. 1972); *Providence Journal Co.* v. *McCoy*, 94 F. Supp. 186, 195-96 (D.R.I. 1950), *aff'd on other grounds*, 190 F.2d 760 (1st Cir. 1951); *Quad-City Community News Service* v. *Jebens*, 334 F. Supp. 8, 13-14 (S.D. Iowa 1971); *Borreca* v. *Fasi*, 369 F. Supp. 9, 42 U.S.L.W. 2410 (D. Haw. Jan. 21, 1974). *See also* the cases cited in the text at p. 30, *supra*, and the cases in n.20, *infra*.

news gathering did not extend so far as to entitle the reporters to maintain the confidentiality of their sources. The rationale of the decision was that, in the circumstances presented, denial of a reporter's privilege of confidentiality with respect to a proper grand jury subpoena would not itself prevent a reporter from interviewing any source he desired, 408 U.S., at 681-82, and that the record failed to show that denial of the privilege would severely constrict the flow of information to the public, 408 U.S., at 690-94.

The decision in *Branzburg* turned on the weighing of the social cost of a clear and definite obstacle to a grand jury investigation against the cost of what the Court found to be an uncertain and speculative injury to the capacity of the press to gather news. On the facts before it, the Court was concerned that grand juries might lose vital testimony from eye-witnesses to crimes. The particular balance struck in *Branzburg* has no bearing on the analysis required in the instant case: the weighing of the social cost of a clear and definite obstacle to news gathering against what the courts below and the District Court in the companion cases, *Pell* v. *Procunier* and *Procunier* v. *Hillery,* found to be, at most, an uncertain and speculative injury to prison administration.

The relevance of *Branzburg* to the instant case lies in its holding that news gathering is entitled to First Amendment protection, and indeed to the protection of the normal First Amendment test requiring that regulations infringing upon First Amendment interests be narrowly and precisely drawn so as to serve only a compelling state interest by the means least restrictive of First Amendment interests. 408 U.S., at

700.[20] See, *e.g.*, *NAACP* v. *Button*, 371 U.S. 415, 439 (1963); *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945); *DeGregory* v. *Attorney General of New Hampshire*, 383 U.S. 825, 829 (1966). When prison regulations infringe upon First Amendment interests, they have no special exemption from the compelling interest test, although of course the special characteristics of prisons are given due weight in applying the test. See, *e.g.*, *Cruz* v. *Beto*, 405 U.S. 319 (1972); *Cooper* v. *Pate*, 378 U.S. 546 (1964); *Nolan* v. *Fitzpatrick*, 451 F.2d 545, 548 (1st Cir. 1971); *Pierce* v. *La Valee*, 293 F.2d 233 (2d Cir. 1961); *Long* v. *Parker*, 390 F.2d 816, 822 (3d Cir. 1968); *Brown* v. *Peyton*, 437 F.2d 1228, 1231 (4th Cir. 1971); *Jackson* v. *Godwin*, 400 F.2d 529, 541-42 (5th Cir. 1968); *Sobell* v. *Reed*, 327 F. Supp. 1294, 1303 (S.D.N.Y. 1971); *Fortune Society* v. *McGinnis*, 319 F. Supp. 901, 904 (S.D.N.Y. 1970); *Carothers* v. *Follette*, 314 F. Supp. 1014, 1024 (S.D.N.Y. 1970).

Nothing in *Zemel* v. *Rusk*, 381 U.S. 1 (1965), is to the contrary. In *Zemel*, the Court held that the Passport Act of 1926 authorized the Secretary of State to refuse to validate U.S. passports for travel to Cuba,

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[20] In post-*Branzburg* cases involving assertion of a newsman's privilege of confidentiality, the lower federal courts have recognized that news gathering is protected by the normal First Amendment test, and have weighed the competing interests on the particular records before them. *See Baker* v. *F&F Investment*, 470 F.2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973); *Cervantes* v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972); *Bursey* v. *United States*, 466 F.2d 1059, 1090-92 (9th Cir. 1972) (on rehearing after *Branzberg*); *Democratic National Committee* v. *McCord, In re Bernstein*, 356 F. Supp. 1394 (D.D.C. 1973); *Linsey* v. *Kelman* (D. Conn., Mar. 20, 1973) (N.Y. Times, March 21, 1973, p. 19); *see also Carey* v. *Hume*, No. 71-1736 (D.C. Cir. Jan. 28, 1974); *United States* v. *Liddy, In re Times Mirror Co.*, 354 F. Supp. 208 (D.D.C. 1973).

and that the exercise of that authority was constitutionally permissible. Zemel asserted that he had a right to travel to Cuba to acquaint himself with conditions there and with the effects of American foreign policy there. The Court rejected this claim on the ground of "the weightiest considerations of national security", citing the 1962 Cuba Missile Crisis, which preceded by less than two months the filing of Zemel's complaint. 381 U.S., at 16. *Zemel* is distinguishable in several important respects from the instant case. First, it involved foreign policy, a matter in which the courts are particularly inexpert, and in which, under the political question doctrine, they have traditionally shown unique deference to executive decisions. *See, e.g., Chicago & S. Air Lines* v. *Waterman S. S. Corp.*, 333 U.S. 103, 111-12 (1948). Second, Zemel did not assert a right to engage in communicative or expressive activity, but only a right to "acquaint" himself with conditions abroad. Thus, the Court could properly say that what was involved was not a restriction of speech, but "an inhibition of action." 381 U.S., at 16. In the instant case, respondents assert not a general right to observe conditions abroad, but a specific right to communicate by speech with specified persons who happen to be, through government compulsion, physically confined to a particular place. The right asserted here is a right to engage in pure speech. Third, in *Zemel* the Court rejected the claim of an "unrestrained right to gather information". 381 U.S., at 17. No such claim is made in the instant case. The right asserted here is buffeted on all sides by qualifications and restrictions. Respondents recognize that press interviews may be subject to reasonable regulations as to time, place and manner. They make no claim of a right to conduct interviews

during times of institutional emergency. They acknowledge, as did the courts below, that interviews with certain inmates may be denied because of the past history of those inmates. Finally, whereas *Zemel* involved a virtually total exclusion of all Americans from Cuba, the federal prisons admit thousands upon thousands of visitors and permit thousands upon thousands of interviews every year. Federal prisons are not little Cubas, walled off from all Americans. The ban on interviews challenged in this case is directed exclusively against the press.

The decision in the instant case must, therefore, turn on the nature and severity of § 1220.1A's restriction on news gathering and on the nature and strength of the Government's interest in imposing a restraint as broad as that of § 1220.1A. Here, as in *Healy* v. *James*, 408 U.S. 169 (1972), what is at issue is a prior restraint. The test applied there by the Court *per* Mr. Justice Powell is equally applicable here:

> "While a college has a legitimate interest in preventing disruption on the campus, which under circumstances requiring the safeguarding of that interest may justify such a restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action." 408 U.S., at 184.

Policy Statement 1220.1A flatly and totally prohibits newsmen from interviewing any of the more than 21,000 prison inmates under the control of the United States Bureau of Prisons. The prohibition of interviews is an assertion of governmental power to prevent two willing persons—the journalist/interviewer and the prisoner/interviewee—from communicating in an interview for the purpose of news gathering, a consti-

tutionally protected activity. *Cf. Shelley* v. *Kraemer,* 334 U.S. 1 (1948).

The assertion of this power in the Policy Statement is virtually unique since only as to persons within its physical control does government have effective power to prevent interviews from taking place. And the persons within the physical control of the government are those incarcerated or housed in government institutions, and in some circumstances the military.

Accordingly, the First Amendment claim in this case is extremely narrow: a claim that two people who want to talk to one another for the purpose of news gathering without being overheard have a right to do so; and that the fact that one of them is a prison inmate does not negate the right, but merely means that the interview may be subjected to reasonable prison regulations as to time, place, and manner, and may be denied altogether in certain narrowly defined circumstances. Respondents fully recognize that in a prison as in a school, First Amendment rights must be "applied in light of the . . . environment." *Tinker* v. *Des Moines Independent Community Sch. Dist.,* 393 U.S. 503, 506 (1969). Throughout this litigation, respondents have expressed their willingness to abide by the ordinary rules governing inmate interviews with lawyers and other visitors. *Cf. Healy* v. *James,* 408 U.S. 169, 195 (1972) (Burger, C. J., concurring).

It should be emphasized what this case does not involve. It does not involve any claim of press access to any person who does not wish to be interviewed, and thus it does not raise any question of an invasion of privacy. Contrast *Commonwealth* v. *Wiseman,* 249 N.E. 2d 610 (Mass.), cert. denied, 399 U.S. 960 (1970)

("Titticut Follies"). It does not involve any assertion of rights with respect to any government officials, government meetings or government documents. It does not involve any interference with the conduct of a trial. Contrast *Estes* v. *Texas*, 381 U.S. 532, 539-40 (1965). It does not involve a claim of access to areas where exclusion of the entire public is required by "the weightiest considerations of national security." Contrast *Zemel* v. *Rusk*, 381 U.S. 1, 16 (1965). Nor does it involve resistance to a subpoena from an official body such as a court or grand jury. Contrast *Branzburg* v. *Hayes*, 408 U.S. 665 (1972).

Further, there is no claim in this case of a First Amendment right to enter prisons at all times and under all circumstances. It is undisputed that the special nature of prisons justifies the establishment of reasonable regulations governing the time, place and manner in which interviews with prisoners may take place. And this case presents no question as to the power of prison authorities to prohibit interviews during riots or other institutional emergencies, or to prohibit interviews with inmates who are dangerous or who present other specific problems.[21]

What respondents do claim is the same right to interview inmates that is enjoyed by relatives, friends, lawyers, clergymen, public officials, former and pro-

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[21] The Government asks whether respondents assert a right to take television cameras into prison. Brief for Petitioners 51. The answer—obviously—is no. This Court has already recognized that television cameras present problems wholly unique to that medium, which are not presented by a newsman with pad and pencil. *See Estes* v. *Texas*, 381 U.S. 532 (1965). Some prison systems do admit television cameras to their institutions, *e.g.*, App. 128, but there is no claim that they are constitutionally required to do so.

spective employers, and other persons who are permitted by the Bureau of Prisons to have private conversations in depth with inmates. App. 630-36, 647. If all these categories of persons are permitted to interview inmates during normal times and subject to reasonable regulations, there is no justification for excluding the press.

The question presented in this case can be decided very narrowly, without any necessity to lay down even the general outline of the First Amendment right to gather news. All that the Court need decide is that where the Government permits a broad segment of the public to have private interviews with competent persons within its custody subject to reasonable regulations as to time, place and manner, it may not exclude the press from interviewing such persons who give their consent, subject to the same regulations, except upon a showing of a compelling interest for such exclusion, and that the ordinary circumstances of a prison do not create such a compelling interest.

III. POLICY STATEMENT 1220.1A DIRECTLY AND SEVERELY RESTRICTS NEWS GATHERING BY DENYING THE PRESS THE USE OF A CRITICAL NEWS GATHERING METHOD.

The gist of the First Amendment claim in this case is the critical need for personal interviews with willing prisoners in order to gather news about prisons effectively, accurately and reliably. That need was demonstrated in the testimony below. See, pp. 9-17, *supra*. It was recognized in the District Court's Findings 20-28, Pet. 50-57, which were affirmed by the Court of Appeals, Supp. Pet. 12-15. Many of the themes reflected in these detailed findings have been emphasized by this Court in other contexts.

In *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), the Government had refused entry into this country to Mandel, an alien professor who had planned to lecture at various American universities. Mandel and several of his intended listeners challenged under the First Amendment the denial of a visa to him. The Government argued that Mandel's exclusion involved no restraint on the First Amendment right of citizens to receive information because alternative forms of communication existed. The Court, *per* Mr. Justice Blackmun, rejected that contention:

> "The Government also suggests that the First Amendment is inapplicable because appellees have free access to Mandel's ideas through his books and speeches, and because 'technological developments, such as tapes or telephone hook-ups readily supplant his physical presence. This argument overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion, and questioning. . . . [W]e are loath to hold on this record that existence of other alternatives extinguishes altogether any constitutional interest on the part of appellees in this particular form of access." 408 U.S., at 765.[22]

Prior statements of this Court also support the conclusion that, for purposes of news gathering, letters are no substitute for interviews. However prompt a prison mail service may be, mail is in most cases inherently too slow to permit adequate and timely coverage of fast-breaking news events. This Court has recognized that the interest in publication of news in a *timely*

[22] The Court nevertheless upheld the exclusion on the ground that the Government's plenary power to exclude aliens barred courts from looking behind a decision to exclude or weighing it against First Amendment claims.

fashion is constitutionally protected, and that delay may be fatal to a story on fast-breaking events. *See New York Times Co.* v. *United States,* 403 U.S. 942 (1971) (granting of certiorari and stay of mandate, and order for greatly expedited hearing in this Court); *Curtis Pub. Co.* v. *Butts,* 388 U.S. 130, 157 (1967) (opinion of Harlan, J., joined by Clark, Stewart & Fortas, J. J.) (suggested distinction between "hot news" and other news). Moreover, this Court has recognized that prison inmates are not apt to be experienced letter writers. "Jails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited." *Johnson* v. *Avery,* 393 U.S. 483, 487 (1969).[23] *See also Goldberg* v. *Kelly,* 397 U.S. 254, 269 (1970), where the Court pointed out the inadequacy of relying on written statements by welfare recipients:

> "Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations. . . . Particularly where credibility and veracity are at issue, . . . written submissions are a wholly unsatisfactory basis for decision."

Moreover, it is obvious that the amount of information an inmate can communicate in, say, an hour-long interview vastly exceeds what he can express in a letter of reasonable length.

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[23] The Chief Justice has observed, "The percentage of inmates in all institutions who cannot read or write is staggering." W. Burger, Remarks to the National Conference on Corrections, p. 10 (Williamsburg, Va., Dec. 7, 1971).

The Government has not seriously challenged the critical importance of face-to-face interviews for the purpose of gathering information. It offered no testimony on this issue below. It does not ask the FBI to restrict its investigative techniques to letters, group interviews, walking tours, and the like.

The Government does point out, as did the courts below, the undisputed fact that under Policy Statement 1220.1A newsmen are able to gather some information about federal prisons. But it is also undisputed on the record that much critical information can be obtained only through face-to-face private interviews in depth. See pp. 12-14, *supra*. The testimony of Arthur Liman on this point was particularly detailed and persuasive.

The assertion of a right to interview in this case does not reflect merely the idle preference of newsmen. It reflects a necessity inherent in any situation where one person seeks to obtain personal impressions and similar information from another person. A newsman gathering news for a story has as much need to interview the sources of information as a detective trying to solve a crime or a lawyer trying to prepare a case. App. 363, 293.[24]

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[24] Despite the strength of the press interest in interviewing inmates, the Government argues that the First Amendment does not even apply. Citing *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), it argues that the power of a prison official to exclude an American reporter from an American prison is as absolute and unreviewable as the power of the Attorney General to exclude an alien from the United States. See Brief for Petitioners 35. This argument is contrary to *Branzburg*, where the Court did engage in First Amendment analysis, and it is contrary to all the decisions cited in n. 19, *supra*. The argument is also a polite request for a return to the long discredited "hands off" doctrine, under which a prison inmate was regarded as a "slave of the state," and prison

IV. NO COMPELLING GOVERNMENTAL INTEREST SUPPORTS POLICY STATEMENT 1220.1A'S TOTAL BAN ON ALL PRESS INTERVIEWS WITH INMATES.

The principal argument advanced by the Government is that press interviews with inmates will endanger prison discipline and security. There is no doubt that the Government has a compelling interest in the security of its penal institutions. But however important prison security may be—and it is very important—it cannot be invoked to justify every restriction which may in some remote way protect security. Even national security may not be so relied upon. In *United States* v. *Robel*, 389 U.S. 258, 263 (1967), this Court stated, "[T]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. '[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.' *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 426 (1934)." *See also New York Times Co.* v. *United States*, 403 U.S. 713 (1971). As the Court stated in *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503, 508 (1969), "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *See also Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 100-01 (1972).

In virtually every case where a prison regulation has been challenged on constitutional grounds, prison discipline and security have been invoked in its defense.

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officials were a law unto themselves and their actions immune from judicial review. *See, e.g., Ruffin* v. *Commonwealth*, 62 Va. 790 (1871). But it is far too late in the day to resurrect any such crabbed view of the reach of the Constitution. See cases discussed at pp. 49-50, *infra*, and cases cited at p. 39, *supra*.

On many such occasions, this Court has found the defense insufficient.

For example, in *Johnson* v. *Avery,* 393 U.S. 483 (1969), Tennessee sought to bar inmates from giving legal assistance to one another. The state urged that its ban was "justified as a part of [its] disciplinary administration of the prisons." 393 U.S., at 486. The Court acknowledged that "prison 'writ writers' like petitioner are sometimes a menace to prison discipline," 393 U.S., at 488, but it held that this factor was not sufficient to justify the total ban.

Similarly, in *Lee* v. *Washington,* 390 U.S. 333 (1968), the Court rejected an argument that racial segregation in prison was justified by the interests in discipline and security. The District Court had dealt with this issue:

> "The only defense offered . . . is that the practice of racial segregation in penal facilities is a matter of routine prison security and discipline and is, therefore, not within the scope of permissible inquiry by the courts. . . . We recognize that there is merit in the contention that in some isolated instances prison security and discipline necessitates segregation of the races for a limited period. However, recognition of such instances does nothing to bolster the statutes or the general practice that requires or permits prison or jail officials to separate the races arbitrarily." 263 F. Supp. 327, 331 (M.D. Ala. 1966) (3-judge court) (footnote omitted).

This Court affirmed without extended discussion.

In *Haines* v. *Kerner,* 404 U.S. 519 (1971), the prisoner had sued for physical injuries resulting from prison disciplinary measures. The District Court had dismissed his complaint, and the Court of Appeals had

affirmed, "emphasizing that prison officials are vested with 'wide discretion' in disciplinary matters." 404 U.S., at 520. This Court reversed, holding: "Whatever may be the limits on the scope of inquiry of courts into the internal administration of prisons, allegations such as those asserted by petitioner . . . are sufficient to call for the opportunity to offer supporting evidence." *Id.*

In *Cruz* v. *Beto,* 405 U.S. 319 (1972), the Court upheld a free exercise claim by a prisoner. The District Court had denied relief on the ground that the complaint presented a matter that should be left "to the sound discretion of prison administration." The District Court had also said, "Valid disciplinary and security reasons not known to this court may prevent the 'equality' of exercise of religious practices in prison." The Court of Appeals had affirmed. *See* 405 U.S., at 321. This Court reversed:

> "We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations. But persons in prison, like other individuals, have [various constitutional rights]." 405 U.S., at 321-22.

See also Jackson v. *Bishop,* 404 F.2d 571 (8th Cir. 1968), (Blackmun, J.), where the court held unconstitutional "the primary disciplinary measure used in the Arkansas [prison] system."

In the instant case, as in previous cases involving alleged interference with prison discipline and security, the defense must be examined closely to determine whether it really supports the particular regulation at issue. Respondents submit that the order developed by the courts below fully protects whatever disciplinary

and security interests are involved. See pp. 68-70, *infra*. Beyond that, the question presented here is whether, in the light of experience as reflected in the record, press interviews pose such a significantly greater danger to prison discipline and security than do interviews with relatives, friends, lawyers, etc. that the Government may completely prohibit press interviews across the board while continuing to permit freely interviews with these other persons.

A. The Experience of Numerous Prison Systems Demonstrates That There Is No Compelling Reason To Ban All Press-Inmate Interviews.

The record shows that about half the prison systems in America have a policy that generally permits press interviews with inmates and denies them only in exceptional circumstances.[25] It also shows that the vast majority of prison systems permit press-inmate interviews in some circumstances as a matter of discretion. See pp. 22-23, *supra*. The Association of State correctional Administrators, a professional association of prison officials, has proposed that such interviews be permitted, as has the National Council on Crime and Delinquency. See Findings 57-58, Pet. 69-70; App. 570-72, 619.[26] Thus, the Federal Bureau of Prisons and Cali-

[25] Counsel for respondents wrote to every state and numerous local jurisdictions requesting a copy of their policy on press interviews with inmates and related materials. All the statements of policy received were offered into evidence. The District Court received into evidence only those statements of policy which had previously been established in written form.

[26] Since the guideline issued by the Association of State Correctional Administrators reflects the views of prison officials, it does not necessarily reflect an impartial or expert weighing of First Amendment interests. But it does make clear that from a correctional point of view there is no reason to exclude the press entirely from interviews with inmates.

fornia are fighting a rearguard action in defense of a policy which the vast majority of correctional officials do not regard as necessary or even desirable from a correctional point of view.[27]

The record also contains detailed testimony on the experience of four jurisdictions that have operated under policies essentially indistinguishable from the order developed by the courts below. Those jurisdictions are New York City, Massachusetts, Illinois and the District of Columbia.

In New York City, press-inmate interviews are freely permitted, except when interview facilities are congested, when there is an institutional emergency, and where the proposed interviewee has a history of disruptiveness. App. 126-27. The interviews are private and uncensored. App. 128. Commissioner Malcolm summed up New York's experience with this policy: "[W]e have had ample time to examine our track record . . . , and we haven't had any problems . . . ." App. 129. Commissioner Malcolm testified that press interviews had not in any way impeded the correctional process. App. 130. He also testified that press interviews had not produced big wheels:

> "There are some prisoners in our institutions who are considered Big Wheels right along and they have been interviewed; and I don't think the wheel is any bigger now than it was before." *Id.*

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[27] California adopted its total ban because of legal, not correctional, considerations. Director Procunier prefers a case-by-case approach from a correctional point of view. App. 170-71. Director Carlson indicated that legal advice also played a role in his adoption of a total ban. App. 212.

Massachusetts has a similarly open policy. App. 323-24. Commissioner Boone testified on the basis of his experience with that policy:

> "While we appreciate the fact that with an open policy you would have isolated instances of problems, as well as you do with a closed policy, I think you have more problems with a closed policy than you do with an open policy." App. 326.

Illinois also has an open policy. App. 568, 529-37. Wardens at individual institutions have considerable discretion within the limits of a policy generally encouraging interviews. *Id.* Director Bensinger testified that his wardens are sufficiently knowledgeable about their institutions and prisoners to be able to tell whether a particular requested interview will cause security or other problems. App. 539. Although the policy has not worked perfectly, Director Bensinger testified, "Our feeling is that the . . . policy is working satisfactorily . . . ." App. 540.

Finally, the District of Columbia has had no problems with its policy of permitting press interviews with inmates. App. 146.

There is no reason to believe that the federal prisons are more likely to experience serious problems from press interviews than are the many jurisdictions that freely permit them. See Finding 53, Pet. 67-68. Commissioner Boone, who spent 16 years with the federal prison system before becoming Commissioner at Lorton and then in Massachusetts, App. 322, testified that the federal system is more developed than state systems and thus is in a better position, from a correctional point of view, to implement a policy permitting press-inmate interviews. App. 323, 347-48. The federal prisons

also have a higher percentage of inmates committed for non-violent crimes than do state or local prisons. App. 595-96; see also App. 150-52, 617-18. Finally, the sentenced inmates in federal prisons who have been through diagnostic procedures are far easier to handle than the inmates held for trial in The Tombs and other penal institutions in New York City. App. 140.

In light of the evidence that numerous jurisdictions have successfully implemented a policy permitting press-inmate interviews, it cannot be said that the Federal Bureau of Prisons has a compelling interest in preventing all interviews.

B. The "Big Wheel" Theory Does Not Justify a Total Ban on Press Interviews.

The Government advances in this Court as it did below the theory that interviews with all inmates should be banned because an interview with one of the tiny fraction of inmates who are big wheels might enhance the status of a negative influence within the prison population. Brief for Petitioners 17-23.

There was unanimity among the correctional officials who testified on the point that the serious trouble-makers in prison are 5-10% of the total inmate population. See App. 341-42, 372, 404, 431. The "negative leaders" or big wheels are a portion of this percentage. As the Court of Appeals pointed out, whatever interest there may be in preventing interviews with big wheels, the "relatively isolated evil" they present cannot justify a ban on interviews with all inmates, regardless of their behavioral history in prison and other individual characteristics.

Indeed, the order developed by the courts below permits the Bureau to deny interviews with big wheels:

an interview may be denied, *inter alia*, "where it is the judgment of the administrator directly concerned, based on . . . the demonstrated behavior of the inmate . . . , that the interview presents a serious risk of administrative or disciplinary problems." Supp. Pet 26.[28]

The Government responds that "it is impossible with any precision to predict the behavior of inmates." Brief for Petitioners 22. Certainly, the prediction of human behavior is not a mathematical science, and errors are made. But the record shows that prison administrators are well able to identify the big wheels among their inmates. Warden Alldredge from the federal system, Director Wainwright from Florida and Director Bensinger of Illinois all testified that the identification can be made. App. 401, 406, 539.

Indeed, because of the resources available to it, the Federal Bureau of Prisons is in a particularly good position to make predictions about inmate behavior. Within the first few weeks of commitment to federal prison, all inmates receive a thorough evaluation, including intensive diagnostic studies. See Defendants' Exhibit 11, p. 7 (Federal Bureau of Prisons Biennial Report 1970-71). The results of this evaluation are available to prison administrators and are the basis for many significant decisions as to the handling of inmates.

The Government further argues that a big wheel will engage in disruptive activities for the purpose of attracting press attention. Brief for Petitioners 19. But the disruptive inmate is precisely the one with whom an interview may be denied under the Court of

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[28] The order is discussed further at pp. 68-70, *infra*.

Appeals' order. Therefore, the order creates absolutely no incentive for disruption.

The Government also points out the obvious undesirability of allowing press interviews during the height of a riot. Brief for Petitioners 20-21. Respondents do not claim any right to interview during an institutional emergency, and the Bureau of Prisons has not asserted that any emergency was present in this case. Moreover, respondents' witness, Arthur Liman, commented on the very passage from the Attica Report quoted by the Government at pp. 20-21 of its brief, App. 300-01, and compared it to the Attica Commission's strong recommendation of continuous press scrutiny of prisons:

> "We felt strongly that the time for the press to exercise its function was not in the middle of an uprising. On the other hand, we feel equally strongly that the press had an essential role to develop the facts of what the conditions in the prison were like, and to do it at a time and in a manner that would not simply evoke rhetoric. To my way of thinking, the only way that can be done is by private interviews where people are not under the pressure of making speeches to please their fellow-inmates or the institutional administrators." App. 301.

Finally, the Government contends that "[i]nterviews create an incentive for newsworthy rhetoric . . . ." Brief for Petitioners 17. Plainly, if the Government opposes press-inmate interviews in order to stamp out "rhetoric" that is newsworthy, it is baldly violating the First Amendment. *Near* v. *Minnesota,* 283 U.S. 697 (1931); *Healy* v. *James,* 408 U.S. 169, 187-88 (1972).

C. The Record Does Not Show That Press Interviews Cause Prison Disturbances.

There was testimony concerning disturbances at Terre Haute penitentiary, and at prisons in Iowa, Florida and Illinois. See App. 373-88, 407-14, 417-18, 421-22, 431-38, 542. The Government asks this Court to find that those disturbances were caused by interviews between inmates and outsiders, though both the lower courts declined to make such a finding. The evidence does not support the Government's interpretation.

The disturbance at Terre Haute was a work stoppage, which Warden Alldredge, who had been transferred from Lewisburg, described as "[t]otally nonviolent." App. 385. This disturbance was similar to those at Lewisburg and Danbury, and there has been no suggestion that either of them was caused by interviews. Warden Alldredge testified that George Michie, an aide to a Congressman, interviewed four inmates. Mr. Michie was then quoted in an Associated Press story by Tom Sedgwick, which appeared in several newspapers. Thereafter, the work stoppage occurred. Warden Alldredge did *not* testify that the work stoppage was caused by Mr. Michie's interviews. Rather, he said, "[i]n my judgment the work stoppage was caused by the press release by Mr. Seppey (phonetic spelling) of the Associated Press . . . ." App. 385. The critical part of the Associated Press story appears at App. 379-80. It contains no details of the interviews with inmates; no inmates are even mentioned. This particular story could have been written without interviews. It thus is evident that interviews had nothing to do with the work stoppage at Terre Haute.

The "disturbance" in the Iowa State Penitentiary was an increase in tensions at an institution already under a general lockup. During this period of institutional emergency, the warden denied permission for press interviews. The Governor over-ruled him, the interviews were held, newspaper stories based on the interviews were published, they were read by the inmates, with a resulting increase in tensions, though, again no violence. App. 433-36. Officials in Iowa do not regard this incident as so serious as to warrant banning press interviews: Iowa continues to permit them, and some have been held since the incident. App. 441. Moreover, under the order developed below there would clearly be no right to an interview in the Iowa circumstances—an institutional emergency and a judgment by the warden on the scene that interviews should not be held. The District Court was quite clear on this point: "My opinion wouldn't require this kind of an interview. . . . I thought I made absolutely clear in my decision that discretion was going to remain in the wardens to determine some of these matters on an individual basis." [28]

The disturbance at Florida State Prison was the one violent incident about which there was testimony. Press interviews took place at the prison in September and October, 1970, over the objection of the Director of Corrections, who was concerned over conditions at the

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[28] The Government contends that there is a danger that the judgments of federal wardens will be overruled by "higher officials" who, in the face of importunings from the press, will be insensitive to the needs of prison security. Brief for Petitioners 27-28. Respondents respectfully submit that the responsible higher officials—the Attorney General of the United States and the Director of the United States Bureau of Prisons—can be relied upon not to jeopardize prison security.

prison. As in Iowa, the correctional official was overruled by a political superior.[29] The disturbance began in mid-February, 1971, several months later. App. 407-12. Thus, any causal connection was highly tenuous. What intervened were newspaper articles describing sub-standard conditions at the prison, and these led to several investigations. *Id.* Director Wainwright acknowledged that the prison had racial tensions and numerous other problems, App. 418. Like Warden Alldredge and Warden Brewer, he did not attribute the disturbance to the press interviews:

> "As I said, we continued to have problems. We were tremendously overcrowded, the repetition of the articles printed of course kept the inmates stirred up considerably more than they would have been otherwise. The numerous investigations . . . caused turmoil in the institution and the morale of the inmates was down, finally resulted in a serious disturbance at the institution." App. 412; *see also* App. 419.

The incident in Illinois also resulted from a newspaper article rather than from an interview. Director Bensinger testified that an interview with an inmate who was Deputy Prime Minister of the Black Panther Party led to an "inflammatory" article, which in turn "caused considerable tension on the grounds of the institution, and considerable problems with our staff, and had a number of inaccuracies." App. 542. There was no violence, and the inmate was transferred to another institution. *Id.* Illinois, like Iowa, continues to permit press interviews. App. 540.

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[29] Thus the interviews would not have been required under the order developed by the courts below.

In all these instances, the testimony focused on "inflammatory" newspaper stories rather than on press interviews, as the source of the problem. Therefore, this testimony in no way supports a total ban on press interviews. Inflammatory articles have no dependence on press interviews. See App. 383-84. Nor do prison officials attempt to insulate inmates from "inflammatory" ideas: at Danbury, the inmates were permitted to watch the Attica uprising on television. App. 200. Finally, the argument that interviews should be banned because they lead to newspaper articles with objectionable content is an argument for unconstitutional prior restraint. *Near* v. *Minnesota,* 283 U.S. 697 (1931); *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971); *Healy* v. *James,* 408 U.S. 169, 184 (1972).

D. No Interest in Uniformity Justifies a Total Ban on Press Interviews.

The claim that Policy Statement 1220.1A is justified as part of a policy of treating all prisoners alike is untenable. As Director Carlson made quite clear, the Federal Bureau of Prisons seeks uniformity only to the extent that it disregards the socio-economic class, prior position, race, and religion of inmates. The Bureau does not seek uniformity in dealing with the correctional needs of offenders. Moreover, the Bureau's disciplinary policy provides wardens with broad discretion. App. 213, 453.

Implementation of a discretionary press-inmate interview policy is consistent with these goals. No differentiation in press-inmate interview decisions should ever be based on the race, religion or economic class of the inmate. Only when disciplinary problems are likely to develop should interviews be denied, and such a denial is entirely consistent with the Bureau's present

flexible approach with respect to discipline and correctional needs generally.

To the extent that the Bureau's concern for uniformity is based on its desire to have inmates treated similarly as they are transferred from one institution to another, the order of the courts below is entirely consistent with this goal. The Court of Appeals emphasized that the order did not require differentiation on an institutional basis when it declared:

> "This misses the thrust of the order, which is to require the Bureau to make distinctions that are based on the individualized requirements of a particular institution at a particular time, as well as on the personal attributes of the inmate seeking to participate in the interview. Compliance with the order should not generate significant discontent based on the application of vastly different standards at different institutions, for the general standard to be applied in all facilities is the same." Supp. Pet. 20.

Any differentiation in treatment at different institutions that does occur will be caused by wardens administering the press-inmate interview policy differently, or by greater security concerns in some institutions due to a larger number of inmates with a history of behavioral problems or a history of institutional disturbances. As to the first case, the Bureau already gives wardens discretion in meeting correctional needs and in implementing disciplinary and visitation regulations. As Professor Mattick pointed out, against this background a discretionary press-interview policy will not significantly add to institutional variations. App. 596-97. In the second case, an inmate transferred to an institution with greater security problems will always experience closer disciplinary controls, and the

impact of a policy which more frequently denies press-inmate interviews cannot be considered significant in view of the other restrictions enforced. Thus, it cannot seriously be argued that the order of the courts below interferes in any way with a legitimate Bureau concern for uniformity.

E. Property Law Concepts Do Not Justify a Total Ban on Press Interviews.

The Government argues that because prisons' physical plants are not freely open to the public they are analogous to private property, from which the press may be entirely excluded. Brief for Petitioners 45-46. However, a newsman seeking to interview a prisoner has no particular desire to enter prison property. If the Bureau of Prisons would permit the interview to be held elsewhere, he would have no objection. But, as the District Court pointed out, "The sources of news are solely in the prisons. No alternative satisfactory sources are available, and the press claims its proper right of access." 357 F.Supp., at 783.

Moreover, prison property is public, not private, property. And it is public property that customarily is open to large segments of the public:

> "Prisons are not walled off sanctuaries like the Pentagon Map Room or the Justices' Conference table at the Supreme Court. Prisons are villages in themselves. Families, lawyers, congressmen, clergymen and friends visit in public interview space provided. Newspapers, magazines, radio and television programs pour in incessantly throughout the day. Within the prison walls there is illness, drug distribution, prostitution and many other matters of everyday occurrence on the outside. Crimes are committed and punishments imposed during incarceration. Inmates are of varying

> ages, political persuasions and background. Some prisoners come and go on furlough or compassionate leave. Mail is substantially uncensored. Local communities are encouraged to participate in the affairs of these institutions by rendering neighborly family counseling and support. Indeed, halfway houses, vocational and educational programs, and other community ventures include prisoners serving time. . . . It is wholly inconsistent with an open democratic society to allow the state to seal off from press scrutiny thousands of men and women who have been charged with or found to have committed criminal offenses." 357 F. Supp., at 782-83.

The Government's citation of *Adderly* v. *Florida,* 385 U.S. 39 (1966), and *Cox* v. *Louisiana,* 379 U.S. 559 (1965), is inapt because both cases involved disruptive demonstrations. Respondents have no desire and claim no right to demonstrate on prison property or to disrupt prison operations. They seek to enter prisons on the same basis that inmates' relatives, friends, lawyers, clergymen and others enter for the purpose of interviews, and they are willing to abide by the same rules that govern other prison visitors. *Cf. Healy* v. *James,* 408 U.S. 169, 195 (1972) (Burger, C.J., concurring). Moreover, here, as in *Amalgamated Food Employees* v. *Logan Valley Plaza,* 391 U.S. 308 (1968), the purpose of the entry onto the property in question is directly related to the normal use of the property. Newsmen who enter prisons for interviews will no more be "trespassers" than are relatives, friends, lawyers, clergymen and others who enter for the same purpose.

Finally, when weighing property rights against the exercise of First Amendment rights, one must "remain mindful of the fact that the latter occupy a preferred

position." *Marsh* v. *Alabama,* 326 U.S. 501, 509 (1946), a "company town" case, but expressly followed in the companion case of *Tucker* v. *Texas,* 326 U.S. 517 (1946), which involved federally owned real property. *See also, e.g., Flower* v. *United States,* 407 U.S. 197 (1972) (military base); *Healy* v. *James,* 408 U.S. 169 (1972) (state college).

F. No Other Considerations Justify a Total Ban on Press Interviews.

1. *Administrative Burdens.* Overwhelming evidence established that no significant administrative burdens would be created by press interviews with inmates. See Finding 48, Pet. 65-66. The Federal Bureau of Prisons permits interviews by counsel, clergy, family, and friends of inmates, presumably without unreasonable administrative burdens. App. 394; Brief for Petitioners 37. Federal penitentiaries are equipped to facilitate large numbers of interviews at any one time, and these facilities are frequently not utilized to their full capacity. App. 395-96. Corrections officials from states which permit press-inmate interviews have testified that no significant administrative burdens have resulted from this policy. App. 131, 332.

Furthermore, as the Court of Appeals pointed out, to the extent that any undue administrative burdens *might* occur as a result of a press-inmate interview policy, they can be entirely eliminated by reasonable regulation of the frequency and duration of interviews:

> "The Bureau advanced its administrative needs as one justification for the imposition of its total interview ban. This, of course, is a legitimate concern that can be accommodated by an individualized standard for determining when to grant interviews. However, this problem is no different from that posed by the administration of other

visitation privileges and can be dealt with in a similar manner. If an institution is besieged with a staggering number of requests to interview an inmate, it can legitimately devise some means of restricting press interviews to manageable proportions. For example, prison administrators might wish to impose a ceiling on the number of interviews in which an individual inmate could participate and allow the inmate himself to choose the particular reporters to whom they will grant interviews." Supp. Pet. 22, n. 20.

2. *Newsmen as Risks to Prison Security.* The argument that newsmen themselves jeopardize prison security provides no justification for an outright ban on all press-inmate interviews, and was firmly rejected by the District Court below, which found:

> "Security procedures used by prison administrators to prevent the introduction of contraband by friends, relatives, attorneys and other visitors to prisoners are readily applicable to newsmen entering prisons to interview inmates, without any loss of effectiveness. . . . Members of the press are no more likely to introduce contraband than are lawyers, friends, relatives, or other visitors. . . . Members of the press are no more likely to participate in escape plans, to solicit offenses, or to make other unlawful or improper communications with inmates than are lawyers, friends, relatives, or other visitors." Finding 47, Pet. 65.

Other courts confronted with the contention that newsmen pose risks to prison security have also rejected this argument. *See Houston Chronicle Pub. Co.* v. *Kleindienst,* 364 F. Supp. 719, 729 (S.D. Tex. 1973), *app. dismissed,* No. 73-3590 (5th Cir. Jan. 11, 1974); *Hillery* v. *Procunier,* 364 F. Supp. 196, 203 (N.D. Cal. 1973), *prob. jur.* noted, 42 U.S.L.W. 3386 (Jan. 7, 1974), and *sub nom. Pell* v. *Procunier,* 42 U.S.L.W. 3422 (Jan 21, 1974).

V. A PRISONERS' RIGHT TO BE INTERVIEWED IS NO SUBSTITUTE FOR A PRESS RIGHT TO INTERVIEW

In the companion cases of *Procunier* v. *Hillery*, No. 73-754, and *Pell* v. *Procunier*, No. 73-918, the District Court for the Northern District of California held that prisoners have a right to be interviewed by willing newsmen, but that newsmen have no right to interview willing prisoners.[30] The issue of a prisoner's right does not arise in the instant case because no prisoners are parties. However, because the cases have been consolidated, respondents address the issue whether a prisoners' right to be interviewed is an adequate alternative to a press right to interview. We submit that it is not.

If the only right to an interview is the prisoner's, he bears the full burden of initially asserting it, and of pressing it to final decision through the various layers of the correctional bureaucracy. Prison authorities have total control over prisoners' lives, and prisoners know it. Many inmates who may be willing to be interviewed may be unwilling or unable to take the initiative in requesting an interview or to appeal from one level of the official hierarchy to another.

The press is far more able to bear this burden. It is independent of prison authorities. It is in a better position to present reasons why in the public interest, and perhaps in the interest of the institution, the interview should be held. It has easier access to counsel to assist in asserting the right.

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[30] The distinction turned entirely on the court's reading of *Branzburg*, and not at all on any weighing of the respective press, public and correctional interests. The court's reading of *Branzburg* was erroneous for the reasons stated at pp. 36-39, *supra*. Thus there is no constitutional basis for recognizing a prisoner right but no press right.

Moreover, the press has the unique expertise, and is uniquely assigned the constitutional function, of determining what matters are newsworthy and what interviews are needed in order to inform the public. Prisoners are not likely to be able to make those judgments with objectivity or expertise.

Of course, a newsman desiring to interview a particular inmate could write to him suggesting that he request an interview. But this circuitous process introduces the delay and other problems accompanying any correspondence by mail with inmates, see pp. 11, 14-15, *supra,* which may be fatal to a news story. The risks of delay are compounded where, as is often the case, a newsman wishes to interview several inmates having knowledge about a particular matter. In that situation he would have to write to each of them, and rely on the ability of each to initiate and press forward a separate request to be interviewed by the reporter. To the extent that the separate requests are processed at different rates, the newsman will encounter delay and perhaps the substantial burden of having to travel several times to one of the out-of-the-way places where prisons tend to be located. By contrast, recognition of a newsman's right would permit a reporter to follow up his own requests to make sure that they were being processed with the greatest possible dispatch, and that they would not be separated in the order of priority.

Finally, as a matter of doctrine, the constitutional claims of one group should not be denied on the ground that the parallel claims of another group are being recognized. In particular, the First Amendment right of the public to be informed about prisons and the First Amendment right of the press to gather news about prisons are independent of any rights of prisoners to be interviewed. If prisoners themselves were

held to have *no* First Amendment rights, the public and press interests in information concerning them would remain, and the consequent First Amendment claims of public and press would be undiminished. Similarly, that inmates have a right to be interviewed by willing interviewers does not lessen the justification for recognizing the corresponding but independent rights of the public and the press, resting as they do on different foundations in First Amendment law.

VI. THE COURT OF APPEALS' ORDER IS SOUND

The Court of Appeals' order, differing only slightly from that of the District Court, grew out of the record made below, and is responsive to every legitimate concern put forward by the Government. On the remand, the Court of Appeals expressly directed the District Court to consider the feasibility of vesting discretion in prison administrators. See 477 F.2d, at 1169. The District Court received considerable evidence on this point, and made detailed findings. See Findings 55-60, Pet. 69-71. Thus the order developed below is the product of a very careful process of decision.

The order provides that interviews between a member of the press and an inmate may be denied

> "only where it is the judgment of the administrator directly concerned, based on either the demonstrated behavior of the inmate, or special conditions existing at the institution at the time the interview is requested, or both, that the interview presents a serious risk of administrative or disciplinary problems." Supp. Pet. 26.

The order provides for decisions on interviews on a case-by-case basis, rather than by broad absolute fiats. This approach is consistent with the views expressed by Director Procunier of California, App. 170-71, and the

prison officials from Massachusetts, Illinois, New York City and the District of Columbia, see pp. 52-53, *supra*. It also reflects the approach recommended by the Association of State Correctional Administrators, Finding 57, Pet. 69. Finally, a case-by-case approach accords with this Court's preferred method of deciding questions of First Amendment rights. *See, e.g., Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 100-01 (1972) ("predictions about imminent disruption from picketing involve judgments appropriately made on an individual basis, not by means of broad classifications"); *Branzburg* v. *Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring).

The order vests the decision-making power in the prison administrator on the scene. The warden of a prison is an experienced senior correctional official. The record shows that he is fully equipped to make the necessary decision. See p. 55, *supra*.

The order provides a clear standard for objective decision, which is based on the testimony of correctional officials. The warden is directed to consider the conditions prevailing at his institution and the behavioral record of the inmate sought to be interviewed, and on that basis to decide whether the interview presents a serious risk of administrative or disciplinary problems. The warden is not required to make a hairline judgment or to offer proof to mathematical certainty. He is required to assess a risk on the basis of his experience and sound judgment. If he finds it to be serious, he may deny the requested interview.[31]

[31] The order does not articulate all the grounds which, as a matter of common sense, may justify the denial of an interview. Thus, an interview may be denied temporarily if the interview facilities are congested. A particular reporter may be denied an interview if there is substantial reason to believe that he will violate prison rules. *Cf. Healy* v. *James*, 408 U.S. 169 (1972).

The Government argues that wardens will inevitably abuse their discretion by permitting or denying interviews on the basis of whether they approve of what the inmate will say and what the newsman will publish. Brief for Petitioners 23-24. There is some irony in the Solicitor General presuming that government officials will abuse their discretion and in respondents having to defend them. This record, at least, contains no evidence whatever that suggests that correctional officials can not or will not properly implement the kind of order developed by the courts below. Prison officials throughout the Nation successfully administer policies of just this sort. Indeed, the wardens of federal prisons already exercise broad discretion with respect to inmate discipline, App. 212-13, and other matters. There is no reason to think they are more likely to abuse discretion over interviews than the broad discretion they already have.

Finally, the Court of Appeals' order properly reflects the weight of First Amendment values. It establishes a presumption in favor of interviews, which is rebutted upon a showing of special need to deny a particular interview. The permissible basis for denial is narrowly and precisely delineated so as to authorize the least restriction upon First Amendment interests while fully protecting compelling governmental interests. See cases cited at p. 39, *supra*.[32]

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[32] The Government notes that the District Judge said during a colloquy with Director Carlson: "You wouldn't be required to permit any interviews in maximum security institutions." Brief for Petitioners 31, n. 7. Respondents submit that the District Judge misspoke himself. The order, as issued by the District Court and modified by the Court of Appeals, makes no exception for maximum security institutions. See the Court of Appeals' opinion at Sup. Pet. 20.

CONCLUSION

United States Parole Board Chairman Maurice H. Sigler recently stated to a group of correctional officials: "So far, we have been able to live with the rulings of the courts. They haven't brought about the disastrous consequences some of us have predicted. Instead, the effect of the courts' new interest in corrections has been beneficial." M. Sigler, "A New Partnership in Corrections," (Address before the 102d Congress of the American Correctional Association, Aug. 21, 1972). In the long run, a decision for respondents in this case will also be beneficial to corrections. For this and the other foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Certificate of Service

I hereby certify that three printed copies of the foregoing Brief for the Respondents were hand-delivered, this 8th day of April, 1974, to:

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In addition, three printed copies of the foregoing brief were mailed, first-class air mail, postage prepaid, this 8th day of April, 1974 to each of the following:

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